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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

NORTH CASCADES
CONSERVATION COUNCIL, a
nonprofit Washington corporation;

Plaintiff,

v.

U.S. FOREST SERVICE, a federal
agency of the United States; and
KRISTIN BAIL, in her official capacity
as Forest Supervisor, Okanogan-
Wenatchee National Forest, U.S. Forest
Service,

Defendants,

Case No. 2:22-cv-00293-SAB

**DEFENDANTS' COMBINED
CROSS-MOTION FOR
SUMMARY JUDGMENT,
MEMORANDUM IN SUPPORT
OF CROSS-MOTION, AND
RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT (ECF
No. 15)**

**11/30/2023
With Oral Argument: 10:00 a.m.
Video**

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INTRODUCTION

Like other national forests throughout the West, past management of the Okanogan-Wenatchee National Forest (Forest) in north central Washington has resulted in unnatural forest stands that are overstocked and homogeneous in structure and composition. This leads to a less resilient forest that is subject to high intensity wildfires, insect infestations, and disease outbreaks. Over a decade ago, the Forest Service developed a restoration strategy to improve the resiliency of the Forest. In furtherance of this strategy, the Forest Service conducted a landscape-level assessment of conditions on areas of the Forest near Twisp, Washington, documenting how current conditions depart from desired historic and future reference conditions. That assessment recommended that the Forest Service develop projects to begin to restore the forest and improve its resiliency by bringing it closer to the desired conditions. Toward that end, after more than three years of planning, public participation, environmental analysis, and consultation with tribes and other government agencies, the Forest Service approved the Twisp Restoration Project (Project) in July 2022.

The Project will improve forest resiliency in the Project area by, among other things, authorizing non-commercial understory thinning, commercial overstory vegetation treatments, and prescribed fire to reduce fuels. And it will accomplish this largely through the application of condition-based management by which pre-identified units in the Project area that meet certain decision criteria will be treated according to detailed prescriptions. In developing the Project, the Forest Service received extensive public comments during scoping and in response to a draft environmental assessment (EA). It then sought and received further public input following a wildfire in the Project area in 2021 before issuing a final EA and approving the project.

All of this satisfied the Forest Service's obligations under the National

1 Environmental Policy Act (NEPA). Nevertheless, Plaintiff brought this action
2 claiming that the Forest Service violated NEPA by failing to consider a reasonable
3 range of alternatives, take a hard look at the potential environmental consequences
4 of the Project, sufficiently engage the public, and prepare an environmental impact
5 statement (EIS). None of Plaintiff's claims is well founded and the Court should
6 enter summary judgment for Defendants.

7 **I. BACKGROUND**

8 **A. Factual Background**

9 **1. Management of the Okanogan-Wenatchee National Forest**

10 The Forest Service manages the part of the Forest encompassing the Project
11 under a 1989 land and resources management plan (Forest Plan) that identifies
12 various forest management goals and objectives, forest-wide standards and
13 guidelines, and management area prescriptions. AR01561-671 (record of decision
14 approving Forest Plan); AR01716-824 (Forest Plan management direction). This
15 includes standards and guidelines for managing mixed conifer old growth stands.
16 AR01748-49; AR00620 (defining mixed conifer old growth). The Forest Service
17 implements the Forest Plan through site-specific projects like the Project.
18 AR01679 ("Specific activities and projects will be planned and implemented to
19 carry out the direction in this Forest Plan.").

20 The Forest is in the range of the northern-spotted owl (NSO). *See* AR03963.
21 After the NSO was listed as a threatened species under the Endangered Species Act
22 (ESA), the Forest Service adopted the Northwest Forest Plan (NWFP) in 1994 to
23 amend forest plans within the NSO's range to include standards and guidelines for
24 the management of habitat for late-successional and old-growth forest related
25 species within the range of the NSO. AR03946-4181 (ROD approving NWFP).
26 The NWFP provides for ecosystem management in a way "that will both maintain
27 the late-successional and old-growth forest ecosystem and provide a predictable
28

1 and sustainable supply of timber, recreational opportunities, and other resources at
2 the highest level possible.” AR03979. The NWFP does this by allocating land to
3 various areas that are to be managed for specified purposes according to detailed
4 standards and guidelines. AR03955.

5 These land-use allocations include late successional reserves (LSR), riparian
6 reserves, and matrix lands. AR03957-61. LSRs are intended to “maintain a
7 functional, interactive, late-successional and old-growth forest ecosystem” that will
8 “serve as habitat for late-successional and old-growth related species including the
9 [NSO].” AR03957. “Riparian reserves are areas along all streams, wetlands,
10 ponds, lakes, and unstable or potentially unstable areas where the conservation of
11 aquatic and riparian-dependent terrestrial resources receives primary emphasis.”
12 AR03958. Their main purpose “is to protect the health of the aquatic system and
13 its dependent species.” *Id.* Matrix lands are lands outside the reserves and the
14 other land-use allocations “in which most timber harvest and other silvicultural
15 activities will be conducted.” *Id.*

16 **2. Okanogan-Wenatchee National Forest Restoration Strategy and** 17 **Twisp Landscape Evaluation**

18 In November 2012, the Forest Service finalized a document titled “The
19 Okanogan-Wenatchee National Forest Restoration Strategy: adaptive ecosystem
20 management to restore landscape resiliency” (Restoration Strategy). AR05890-
21 6008. The Restoration Strategy identified the need for a concerted effort “to restore
22 the sustainability and resiliency of forested ecosystems on the [Forest],” in light of
23 documented “(1) increased susceptibility to uncharacteristically large and severe
24 fires; (2) uncharacteristically severe insect outbreaks; and (3) habitats . . . declining
25 for late-successional and old forest associated species.” AR05895. The
26 Restoration Strategy also explained that “while the Forest’s aging road network
27 provides needed access for recreation and forest management, it also degrades the
28 condition of aquatic ecosystems.” *Id.* To improve forest resilience and aquatic

1 ecosystems on the Forest, the Restoration Strategy promoted a “planning approach
2 based on principles of landscape-level restoration ecology,” *id.*, in which
3 “ecological outcomes for multiple resources drive the development and
4 implementation of projects,” AR05897.

5 Implementation of this ecosystem management approach involves first
6 preparing a landscape evaluation and then developing projects for restoration
7 treatments based on that evaluation. AR05923. The landscape evaluation looks at
8 five ecological indicators that “are meaningful at the landscape scale,” and for
9 which “[r]eference conditions have been established for both the historical range
10 of variability and the future range of variability, representing a likely climate
11 change scenario.” *Id.* These five indicators are: “(1) forest landscape pattern and
12 departure; (2) risk of insect infestation; (3) stand-level fuels and fire movement
13 potential; (4) wildlife habitat amount and arrangement; and (5) aquatic/road
14 interactions and road network evaluation.” *Id.* The landscape evaluation process
15 prioritizes areas “where restoration should occur in order to affect larger landscape
16 change” by identifying potential landscape treatment areas (PLTAs). AR05924;
17 *see also* AR05924-26 (summary of landscape evaluation process); AR05929-45
18 (details of process). Projects are then to be developed in the PLTAs that will
19 contribute to restoring the sustainability and resiliency of forest ecosystems on the
20 Forest. AR05945-48.

21 In April 2019, the Forest completed the Twisp Landscape Evaluation (Twisp
22 Evaluation), covering six watersheds in the greater Methow Valley in Okanogan
23 County, Washington: Upper Twisp River, Middle Twisp River, Little Bridge
24 Creek, Lower Twisp River, Thompson Creek, and Alder Creek. AR06844;
25 AR06846 (map). The Twisp Evaluation explained that previous management to
26 suppress wildfires, promote grazing, intensively harvest timber, and build roads
27 related to these activities “has caused widespread degradation of forest, rangeland,
28

1 watershed condition and stream habitat, and has increased the risks of
2 uncharacteristically severe wildfire.” AR06844. This has resulted in an “urgent
3 need” for ecological restoration projects on the Forest as illustrated by eastern
4 Washington experiencing “some of its worst fire seasons on record” the last few
5 years. *Id.* To aid in the development of such projects, the Twisp Evaluation
6 examined the ecological conditions of the six watersheds, comparing current
7 conditions with reference conditions (i.e., historic and future ranges of variability)
8 to “identify significant areas of departure.” AR06846; *see also* AR06847-50
9 (detailing terrestrial and aquatic evaluation methods).

10 Having quantified such areas of departure in the terrestrial and aquatic
11 environment, which reflect “a less resilient environment,” the Twisp Evaluation
12 found “several opportunities for restoration.” AR06882. For the terrestrial
13 environment, underburning could “be used to thin out the smaller ladder fuels and
14 reduce the risk of spreading crown fire, whereas thinning can open up space for the
15 growing of larger trees which are more resilient and provide better structure for
16 wildlife.” *Id.* And for the aquatic environment, road-related impacts could “be
17 addressed by implementing road specific restoration methods,” such as
18 “decommissioning, relocating all or portions of the road, hydrologically closing
19 roads, and upgrading existing roads.” AR06883.

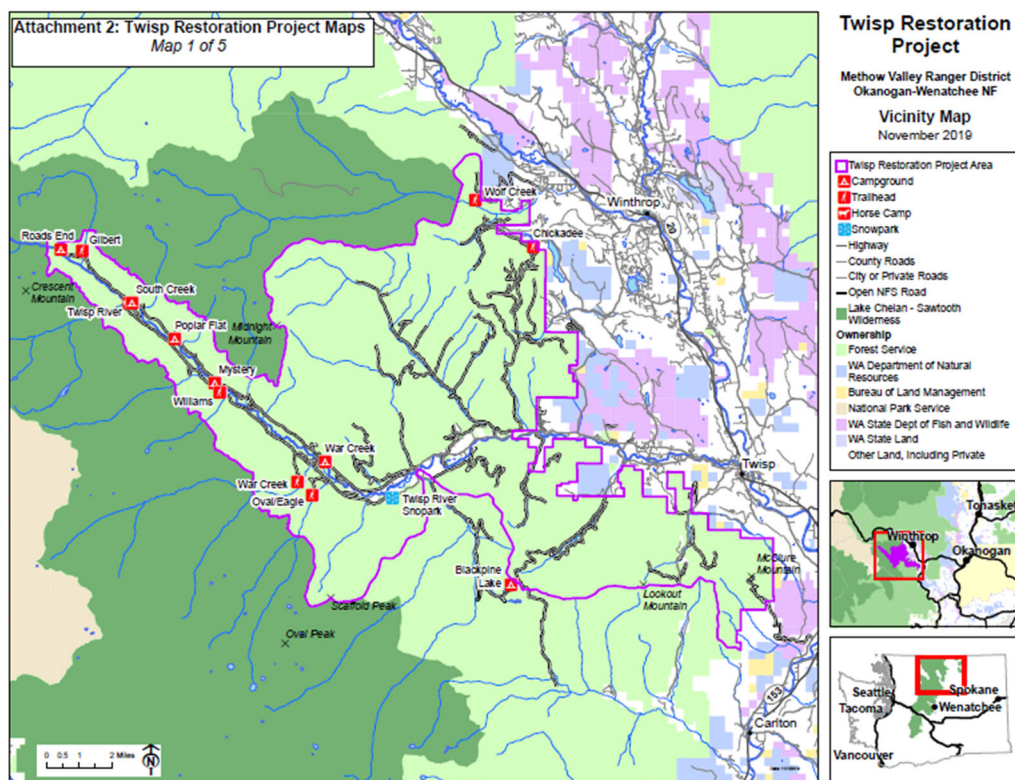
20 **3. Twisp Restoration Project**

21 **a. Project Initiation and Scoping**

22 Consistent with the Restoration Strategy, the Forest established a fourteen-
23 member interdisciplinary team (IDT) in June 2019 to develop a restoration project
24 in a 79,682-acre area of the Methow Valley Ranger District covered by the Twisp
25 Evaluation. AR06905-08. The project would move the landscape toward more
26 resilient desired future conditions by: (1) changing the vegetation composition,
27 structure, and pattern to intersect with the historic and future ranges of variability
28

as defined in the Restoration Strategy and other sources; (2) reducing the potential for high intensity wildfire in the wildland urban interface (WUI); and (3) designing and maintaining forest infrastructure, including roads, to reduce water quality impacts and maintain healthy, functioning watersheds that provide high quality water, air, and fishery habitat. AR06906.

In November 2019, a scoping letter was sent to 362 individuals, groups, and agencies detailing the proposed project developed by the IDT, scheduling a public open house, and inviting comments on the proposal. AR07003-05; AR07398. As displayed in the below map, the proposed project was in a 77,038-acre area “southwest, west and northwest of Twisp, Washington in the Twisp River, Alder Creek, Rader Creek, and Wolf Creek drainages.” AR07003.



AR07015.

In developing the proposed action, the IDT had applied the Restoration Strategy to “identify areas where the current conditions have departed from desired

1 conditions.” AR07006. This process identified five needs to be addressed based
2 on conditions specific to the project area: (1) protection and maintenance of high-
3 functioning aquatic, riparian, and hydrologic resources for species listed under the
4 ESA and increased resiliency of watersheds to existing and anticipated
5 disturbances; (2) modification of vegetation structure, composition, and patterns to
6 improve resiliency to disturbances and bring vegetation within historic and future
7 ranges of variability; (3) creation and maintenance of wildlife habitat, including
8 late and old forest structure stands; (4) modification of forest stands in and next to
9 the WUI to reduce fire intensity and enable direct firefighting strategies to protect
10 life and personal property, and reduction of fire intensity in certain areas outside
11 the WUI to aid fire suppression efforts; and (5) provision of an affordable, safe,
12 and efficient transportation system. AR07006-09.

13 The proposed project would address the first and fifth needs through various
14 actions, including closing or decommissioning roads, replacing culverts,
15 reestablishing aquatic connectivity, introducing coarse woody debris and
16 engineered log jams to aquatic habitat, thinning of tree stands, prescribed fire
17 treatments, and removal of hazard trees. AR07010. It would address the remaining
18 needs through additional actions, including commercial and noncommercial
19 thinning and prescribed fire treatments. AR07010-11. As explained in the scoping
20 letter, most of the thinning and prescribed fire treatments would use “a condition-
21 based management strategy,” which involves developing a suite of proposed
22 treatments based on “pre-identified management requirements and specific
23 resource conditions across a broad area,” and applying “the most appropriate
24 treatments to move resources toward the desired conditions” based on pre-
25 implementation field reviews. AR07009.

26 **b. Draft EA**

27 After receiving and considering responses to the scoping letter from 55
28

1 individuals, organizations, businesses, and local governments, the Forest Service
2 issued a Draft EA in October 2020. AR07383-625; AR07396 (noting number of
3 responses). The Draft EA considered a no-action and proposed action alternatives,
4 analyzing the potential environmental effects of each. AR07403-504. The Draft
5 EA also considered various other alternatives but eliminated them from detailed
6 study because they would not meet the needs for the project. AR07403-04.

7 Although the needs for the project remained the same in the scoping letter
8 and Draft EA, AR07392-96, the Forest Service changed the proposed action in the
9 Draft EA in response to issues raised in the public comments, AR07405-06. The
10 Draft EA's proposed action provided for understory vegetation thinning on up to
11 30,220 acres and overstory vegetation treatments on at most 21,985 acres.
12 AR07408-09 (Table 4). The overstory vegetation treatments would use condition-
13 based management to thin up to 10,840 acres of matrix lands, with the remainder
14 being site specific treatments on matrix lands, LSRs, riparian reserves, and
15 inventoried roadless areas. *Id.* The overstory thinning in matrix lands would allow
16 removal of trees up to thirty inches in diameter. AR07517-18. Fuel reduction
17 through piling, pile burning, and underburning would occur on at most 59,093
18 acres, requiring the construction of 204.5 miles of fire line. AR07409. The
19 proposed action would also include wildlife and aquatic habitat enhancement
20 measures, and would provide for certain trail and transportation management
21 activities. AR07409-10.

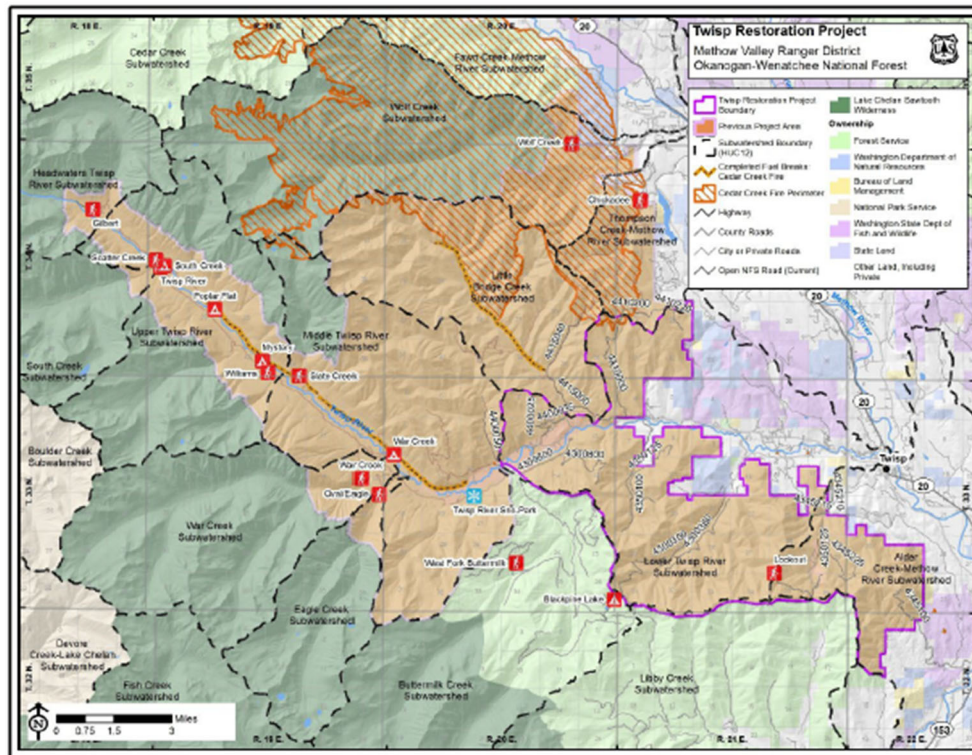
22 Release of the Draft EA triggered a comment period that closed on
23 December 28, 2020. AR07626-27; AR10533. Between the release of the Draft
24 EA and closure of the comment period, the Forest Service hosted a virtual open
25 house and facilitated a self-guided tour of the project area (in light of then-
26 applicable COVID-19 restrictions). AR10465-68. The Forest Service ultimately
27 received 1,029 comments on the Draft EA. AR12606; AR07628-10425.
28

1 **c. Final EA and DN/FONSI**

2 Shortly before completion of the Final EA, “the Cedar Creek Fire burned
3 into the northern portion of the project area in August 2021, causing mild to severe
4 fire effects in the Wolf, Rader, and Little Bridge Creek drainages.” AR12594. Fire
5 suppression activities also involved fire line construction and fuel break thinning
6 “in portions of the Little Bridge Creek and middle/upper Twisp River drainages.”
7 *Id.*

8 In response to the Cedar Creek Fire and comments received to the Draft EA,
9 the Forest Service revised the proposed action to omit areas potentially affected by
10 the Fire, explaining those revisions in a public meeting in January 2022. AR11349;
11 AR11295-310; AR12029. A representative of Plaintiff attended that meeting and
12 later expressed to the Forest Service that the “brevity and clarity” of the information
13 presented “was impressive.” AR11316. The Forest Service provided a public link
14 to the meeting and materials used, summarized the major changes to the proposed
15 action, and provided an update on the status of the Final EA. AR11349.

16 The Forest Service released the Final EA in April 2022, highlighting the key
17 differences between the proposed action in the Draft EA and Final EA. AR12594-
18 97. The revised proposed action reduced the project area to 24,140 acres.
19 AR12593. Among other changes, this resulted in “dropping proposed thinning and
20 prescribed fire actions and most transportation-related changes in the Wolf, Rader,
21 and Little Bridge Creeks and upper and middle Twisp River sub-watersheds.”
22 AR12594. The below map identifies the original project area, the Cedar Creek Fire
23 footprint, and the revised project area:



AR12596.

The Final EA's proposed action provided for non-commercial understory vegetation thinning on up to 13,812 acres and commercial overstory vegetation treatments on up to 8,151 acres. AR12618 (Table 6). No overstory treatments would occur in LSRs, with condition-based thinning on up to 7,275 acres of matrix lands and site-specific treatments for the remainder on matrix lands and in riparian reserves. *Id.* The diameter cap on overstory thinning on matrix lands was reduced from thirty inches ("large" trees) to twenty-one inches ("medium" trees). AR12724; AR12721 (defining "medium" and "large" trees). Fuel reduction through piling, pile burning, and underburning would occur on at most 23,167 acres, with 102.6 miles of associated fire line construction. AR12618. The proposed action would address transportation management by removing hazard and danger trees, replacing culverts, and road construction, maintenance, and closures. AR12625-26. And although there would still be some aquatic habitat enhancement measures, AR12619, most of that work became a separate project, the Twisp

1 Aquatic Restoration Project, implementation of which was expected to begin soon
2 after April 2022. AR12595.

3 The Forest Service released a draft Decision Notice and Finding of No
4 Significant Impact (DN/FONSI) concurrently with the Final EA. AR12099-127.
5 Under Forest Service regulations, this triggered a 45-day period during which
6 individuals and organizations who previously commented on the scoping letter or
7 Draft EA could object to the Final EA or draft DN/FONSI. AR12090 (citing 36
8 C.F.R. pt. 218). The scope of those objections could include “new information that
9 arose after the opportunities for comment.” *Id.* The Forest Service received several
10 objections, including objections from Plaintiff. *See* AR12162-253. Those
11 objections were discussed with the Acting Deputy Regional Forester on July 12,
12 2022, and written responses to those objections were provided two weeks later.
13 AR12282-84; AR12451-85; AR12498-506.

14 In the meantime, the Forest Service had also completed its consultation
15 requirements under the ESA with the National Marine Fisheries Service (NMFS)
16 and U.S. Fish and Wildlife Service (FWS). AR12404-44 (FWS); AR12130-36
17 (NMFS). NMFS concurred with the Forest Service’s determination that the
18 proposed action may affect but would not likely adversely affect two ESA-listed
19 aquatic species, finding that the potential effects on those species were
20 insignificant. AR12134. Similarly, FWS concurred with the Forest Service’s
21 determination that the proposed action may affect but would not likely adversely
22 affect five aquatic and terrestrial species, including the NSO. AR12441.

23 The Forest Supervisor adopted the proposed action in the Final EA as the
24 Twisp Restoration Project in a final DN/FONSI dated July 20, 2022. AR12830-
25 66. In doing so, the FONSI examined the context and intensity of the Project,
26 concluding that an EIS was not required because it would not “have a significant
27 effect on the quality of the human environment.” AR12843.
28

4. Procedural History

Plaintiff brought this action challenging the Project in November 2022, asserting one claim under NEPA and another under the Federal Advisory Committee Act (FACA). Compl. ¶¶ 19-36, ECF No. 1. Consistent with the case schedule, Plaintiff moved for summary judgment on July 7, 2023. ECF No. 14. In that motion, Plaintiff waived its FACA claim, leaving only Plaintiff's NEPA claim at issue. Pl.'s Mot. for Summ. J. (Pl.'s Br.) 1 n.1, ECF No. 15.

B. Legal Background

1. National Environmental Policy Act

NEPA ensures that federal agencies consider the environmental consequences of major federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331; 40 C.F.R. § 1501.1. NEPA serves the twin aims of informing agency decision-makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to members of the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA itself “does not mandate particular results, but simply prescribes the necessary process.” *Id.* at 350. As a result, a “court must avoid passing judgment on the substance of an agency’s decision. Its focus must be on ensuring that agencies took a ‘hard look’ at the environmental consequences of their decisions.” *Westlands Water Dist. v. U.S. Dep’t of Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (citing *Robertson*, 490 U.S. at 350).

NEPA requires the preparation of an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An agency may prepare an EA “for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown.” 40 C.F.R. § 1501.5(a). An EA is “a concise public document prepared by a Federal agency to aid an agency’s compliance with [NEPA] and support its determination of whether to prepare an [EIS] or a finding

1 of no significant impact [(FONSI)].” *Id.* § 1508.1(h). If an agency concludes the
 2 proposed action has no significant effect, “it may issue a FONSI in lieu of preparing
 3 an EIS.” *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir.
 4 2006); *see* 40 C.F.R. § 1501.6(a).

5 **2. Administrative Procedure Act**

6 Agency decisions under NEPA are reviewed under the judicial review
 7 provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *See*
 8 *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008); *Karuk Tribe of Cal.*
 9 *v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc). Under the
 10 APA, agency decisions may be set aside if they are “arbitrary, capricious, an abuse
 11 of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In
 12 accordance with that standard, an agency’s decision will be overturned

13 only if the agency relied on factors which Congress has not intended it
 14 to consider, entirely failed to consider an important aspect of the
 15 problem, offered an explanation for its decision that runs counter to the
 16 evidence before the agency, or is so implausible that it could not be
 ascribed to a difference in view or the product of agency expertise.

17 *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008) (citation omitted).

18 The standard of review is “highly deferential, presuming the agency action to be
 19 valid and affirming the agency action if a reasonable basis exists for its decision.”

20 *Nw. Ecosys. All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)
 21 (citation omitted). The APA “does not allow the court to overturn an agency
 22 decision because it disagrees with the decision or with the agency’s conclusions
 23 about environmental impacts.” *River Runners for Wilderness v. Martin*, 593 F.3d
 24 1064, 1070 (9th Cir. 2010) (per curiam).

25 **II. ARGUMENT**

26 **A. The Stated Purpose and Need for the Project was Not Unreasonably** 27 **Narrow and the Final EA Considered a Reasonable Range of** 28 **Alternatives.**

Plaintiff argues that the Forest Service violated NEPA by too narrowly

1 defining the purpose and need for the Project and by failing to consider a reasonable
2 range of alternatives. Neither fact nor law supports Plaintiff's arguments.

3 **1. Purpose and Need Statement**

4 "NEPA requires federal agencies to 'study, develop, and describe
5 appropriate alternatives to recommended courses of action.'" *Ctr. for Biological*
6 *Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012) (quotation omitted). "The
7 stated goal of a project necessarily dictates the range of 'reasonable' alternatives
8 and an agency cannot define its objectives in unreasonably narrow terms." *City of*
9 *Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997).
10 Agencies, however, have "considerable discretion to define the purpose and need
11 of a project," *Westlands Water Dist.*, 376 F.3d at 866 (citation omitted), and a
12 statement of purpose and need is unreasonably narrow only if it preordains the
13 agency's consideration of specific alternatives, *Env't Def. Ctr. v. Bureau of Ocean*
14 *& Energy Mgmt.*, 36 F.4th 850, 876 (9th Cir. 2022).

15 The Forest Service reasonably defined the purpose and need of the Project.
16 From scoping through the Final EA, the Forest Service identified five needs that a
17 project would address. These included protecting and maintaining aquatic
18 resources and improving watershed resiliency, remedying past forest management
19 by moving the forest toward a more resilient condition consistent with historic and
20 future ranges of variability, enhancing wildlife habitat, reducing fire intensity while
21 creating conditions to safely manage wildfire in the WUI, and managing the
22 transportation system in an affordable, safe, and efficient manner. AR12600-04.
23 None of these five needs, collectively or individually, preordained a specific project
24 or required what Plaintiff mischaracterizes as "heavy and extensive logging."¹ Pl.'s
25

26 ¹ Commercial treatments will occur in about one-third of the Project area and will
27 consist almost entirely of thinning instead of more intensive harvest methods.
28

Br. 13.

Unsurprisingly, Plaintiff cites no cases that would support invalidating the Forest Service's statement of purpose and need. And that's because courts regularly uphold much narrower statements. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999) (upholding purpose and need statement to "consolidate ownership and enhance future resource conservation and management by exchanging parcels of National Forest System and Weyerhaeuser land."). Indeed, courts have routinely rejected arguments like Plaintiff's. *See Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1067 (9th Cir. 1998) (upholding purpose and need statement for vegetation management and timber production project); *Kettle Range Conserv. Group v. U.S. Forest Serv.*, 148 F. Supp. 2d 1107, 1117-18 (E.D. Wash. 2001) (finding purpose and need statement that included commercial timber harvest not unreasonably narrow). The Forest Service's statement of purpose and need was reasonable and does not support a NEPA violation.

2. Reasonable Range of Alternatives

The range of alternatives an agency must consider is "dictated by the nature and scope of the proposed action." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (citations omitted). "Alternatives that do not advance the purpose of [a project] will not be considered reasonable or appropriate." *Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1247 (9th Cir. 2005).

Importantly, "an agency's obligation to consider alternatives under an EA is

AR12618 (Table 6), AR12621-23 (overstory treatments). The understory thinning and fuel reduction treatments remove only small vegetation that does not have commercial value. AR12621 (limiting understory thinning to conifers of less than ten inches in diameter); AR12623-24 (fuel reduction treatments).

1 a lesser one than under an EIS.” *Id.* at 1246 This is because “whereas with an EIS,
2 an agency is required to ‘[r]igorously explore and objectively evaluate all
3 reasonable alternatives,’ with an EA, an agency only is required to include a brief
4 discussion of reasonable alternatives.” *N. Idaho Cmty. Action Network v. U.S.*
5 *Dep’t of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (citation omitted). An EA
6 must consider a “no action” alternative and a “preferred alternative.” *See Native*
7 *Ecosys. Council*, 428 F.3d at 1245-46. But beyond that, there is no “numerical
8 floor on alternatives to be considered,” *id.* at 1246, and consideration of only these
9 two alternatives is “generally sufficient,” *Idaho Conserv. League v. Bonneville*
10 *Power Admin.*, 667 F. App’x 214, 215 (9th Cir. 2016); *see also Earth Island Inst.*
11 *v. U.S. Forest Serv.*, 697 F.3d 1010, 1021-22 (9th Cir. 2012) (noting EA’s
12 consideration of “both a no-action and preferred action alternative” generally
13 sufficient). Indeed, “it makes little sense to fault an agency for failing to consider
14 more environmentally sound alternatives to a project which it has properly
15 determined, through its decision not to file an impact statement, will have no
16 significant environmental effects anyway.” *Earth Island Inst.* 697 F.3d at 1023
17 (citation omitted).

18 The Final EA considered in detail a no-action alternative and a proposed
19 action alternative. AR12615-33. It also identified several alternatives that “were
20 considered but dismissed from detailed consideration” for various reasons.
21 AR12610-15. This consideration of alternatives and explanations for why other
22 alternatives were not considered satisfied NEPA. Plaintiff nevertheless claims that
23 the Final EA’s explanations for not considering three of the proposed alternatives
24 in detail were arbitrary or capricious. Pl.’s Br. 13-16. They were not.

25 First, the Final EA explains that alternatives employing smaller diameter
26 caps than the 21 inches contemplated by the Project “were not developed further
27 because using these upper diameter limits would decrease stand diversity (age,
28

1 structure, and habitat), facilitating movement towards more even-aged stands over
2 time which departs further from the historical and future ranges of variability
3 desired in treated acres.” AR12611. This would in turn “limit development of
4 desired late-successional habitat and continue to increase density-induced mortality
5 and elevate risks of disturbances (fire, insect & disease), impacting wildlife habitat
6 (Need #3) and wildfire hazards in the [WUI] (Need #4).” *Id.* In other words, this
7 proposed alternative would be counterproductive to the Project’s purpose and need.

8 These explanations were based on the Forest Service’s “scientific judgment
9 and are entitled to deference.” *Audubon Soc’y of Portland v. Haaland*, 40 F.4th
10 967, 983 (9th Cir. 2022) (citing *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d
11 1073, 1087 (9th Cir. 2013); *Native Ecosys. Council v. Weldon*, 697 F.3d 1043, 1051
12 (9th Cir. 2012)). Rather than point to contrary evidence, Plaintiff speculates that
13 the condition-based management approved for much of the Project might not have
14 its intended effect and that the Forest Service “[l]ikely” rejected a smaller diameter
15 cap to placate “loggers.” Pl.’s Br. 14. Not only does such speculation find no
16 support in the record that would somehow diminish the deference owed to the
17 Forest Service’s scientific judgment, it misunderstands the Project’s condition-
18 based management as explained in section II.B.1 below.

19 In short, the Forest Service identified specific units in the Project area that it
20 anticipates will benefit from understory thinning, overstory treatments, or fuel
21 reduction treatments. If those stands meet the relevant decision criteria, they will
22 be treated consistent with the prescriptions detailed in the Final EA. *See* AR12616-
23 17. Forest Service experts determined that “[t]hese treatments would shift stand
24 structures from a homogenous young forest multi-story to a diversified structure
25 pattern across the landscape. Treatments would reduce stocking and improve tree
26 vigor by increasing the growing space for the residual stand, therefore improving
27 the overall health of the stand.” AR12533. In other words, the Forest Service
28

1 explained precisely how the treatments applicable to the condition-based
2 management would have their intended effect while a reduced diameter cap would
3 have the opposite effect. This explanation is subject to deference and was not
4 arbitrary or capricious. *See Audubon Soc’y of Portland*, 40 F.4th at 991
5 (“Ultimately, FWS concluded that continued grazing would ‘help achieve its
6 wildlife and habitat objectives,’ while reduced grazing would ‘have the opposite
7 overall effect.’ It is not our role to question that informed scientific judgment.”);
8 *see also Native Ecosys. Council*, 428 F.3d at 1248 (“The availability of commercial
9 timber is simply a collateral benefit to the government and does not change the
10 purpose or scope of the project. Native Ecosystems has not persuaded us that the
11 Forest Service ignored a reasonable alternative.”); *Earth Island Inst.*, 697 F.3d at
12 1023 (no duty for Forest Service to consider alternatives that would increase fire
13 risk where purpose of project is to reduce fire risk); *Bark v. Northrop*, 607 F. App’x
14 652, 654 (9th Cir. 2015) (upholding consideration of no-action and proposed action
15 alternatives for forest thinning project).

16 Second, the Final EA explains that a requested “alternative that would meet
17 the project’s forest health needs through natural succession” would be addressed
18 by the no action alternative, “which would provide for natural succession by taking
19 no active management.” AR12612. This explanation complies with NEPA. *Native*
20 *Ecosys. Council*, 428 F.3d at 1248-49 (no action alternative addressed plaintiff’s
21 proposed alternative and “NEPA does not require federal agencies to consider
22 alternatives that are substantially similar to other alternatives.”).

23 Plaintiff contends this explanation was arbitrary and capricious because a
24 “true natural succession alternative would establish the necessary steps to restore
25 the forest to a natural state.” Pl.’s Br. 14. Stated differently, Plaintiff contends that
26 the Final EA was arbitrary and capricious for not considering an alternative that
27 engaged in active management (i.e., “necessary steps”) to return the forest to
28

1 reference conditions (i.e., “natural state”). But that is precisely what the proposed
2 action is intended to do, and Plaintiff identifies no other specific “necessary steps”
3 that it thinks should have been included in a different action alternative.

4 Further, even if Plaintiff had identified such steps, NEPA would not require
5 consideration of a separate “active management, natural selection” alternative. As
6 the court in *North Cascades Conservation Council v. U.S. Forest Service* explained
7 in similar circumstances:

8 Here, the Forest Service, in the exercise of its discretion, has properly
9 determined that it is an appropriate purpose for the agency to improve
10 habitat in forest stands in the Project area, including those that contain
11 merchantable timber. NEPA does not require the Forest Service to
12 scale back its project in favor of an arguably more environmentally-
friendly alternative that plaintiffs would prefer.

13

14 Having evaluated a reasonable range of alternatives in the EA, marked
15 on one end by a no-action alternative and the preferred alternative on
16 the other, and no significant impacts having been found, nor any
17 substantial questions raised by Plaintiffs, it is clear from the case law
that the statutory and regulatory duty to discuss alternatives for the
Project was met.

18 *N. Cascades Conserv. Council v. U.S. Forest Serv.*, No. 2:20-cv-01321-RAJ-BAT,
19 2021 WL 8344155, at *22 (W.D. Wash. May 28, 2021), *adopted by* No. 2: 20-cv-
20 01321-DGE, 2022 WL 1043930 (W.D. Wash. April 7, 2022), *aff’d by* No. 22-
21 35430, 2023 WL 2642930 (9th Cir. Mar. 27, 2023).

22 Finally, Plaintiff maintains that the Final EA arbitrarily and capriciously
23 declined to consider a “phased approach” to the Project that “would provide for
24 five phases of planning and analysis that would inform the public and allow the
25 public to participate in the planning process at each phase.” Pl.’s Br. 15. But rather
26 than reflecting a substantive alternative to the proposed action that would allow
27 comparison of the potential effects among other alternatives, Plaintiff seeks an
28

1 entirely different planning process altogether. Such an alternative planning process
2 is not the type of “alternative[] to the proposed action” to which NEPA’s
3 alternatives requirement applies because the potential effects of a different process
4 cannot be presented in “comparative form based on the information and analysis
5 presented in the sections on the affected environment (§ 1502.15) and the
6 environmental consequences (§ 1502.16).” 40 C.F.R. § 1502.14. Plaintiff cites no
7 legal support for the proposition that NEPA requires consideration of alternative
8 planning processes, and the Final EA’s rejection of such an alternative was not
9 arbitrary or capricious.

10 In short, the Final EA reasonably considered in detail a no-action and
11 proposed action alternative while explaining why additional alternatives were not
12 considered in detail. Courts routinely uphold similar approaches to complying with
13 NEPA, and the Final EA’s consideration of alternatives was neither arbitrary nor
14 capricious.

15 **B. The Final EA Took a Hard Look at the Project’s Potential Impacts.**

16 Plaintiff maintains that the Final EA failed to take a hard look at the Project’s
17 potential impacts because the Project’s condition-based management approach
18 makes it impossible to take such a hard look and because the Final EA did not
19 consider potential effects of the Midnight Restoration Project, a project that had
20 not yet been proposed or subject to scoping when the Final EA was issued. Pl.’s
21 Br. 16-19. As explained below, both arguments fail. The Final EA contains a
22 detailed review of the applicable condition-based management and its potential
23 effects that facilitated the type of informed decision-making and public
24 participation NEPA requires. Moreover, Ninth Circuit precedent that Plaintiff
25 ignores makes clear that the Final EA was not required to consider a potential
26 project that had not yet been proposed or subject to scoping because such a project
27 was not reasonably foreseeable.
28

1 “NEPA is a pragmatic device that does not mandate particular results, but
 2 simply provides the necessary process to ensure that federal agencies take a ‘hard
 3 look’ at the environmental consequences of their actions.” *Tri-Valley CAREs v.*
 4 *U.S. Dep’t of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) (citation omitted). An
 5 EA satisfies NEPA’s hard-look mandate if it contains a “reasonably thorough
 6 discussion of the significant aspects of probable environmental consequences.”
 7 *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir.
 8 1998). “The purpose of an EA under NEPA is not to amass and disclose all possible
 9 details regarding a proposal, but to create a ‘concise public document’ that serves
 10 to briefly provide sufficient evidence and analysis for determining whether to
 11 prepare an environmental impact statement or a finding of no significant impact.”
 12 *Tri-Valley CAREs*, 671 F.3d at 1128 (citation omitted). “An EA must provide the
 13 public with sufficient environmental information, considered in the totality of the
 14 circumstances, to permit members of the public to weigh in with their views and
 15 thus inform the agency decision-making process.” *Id.* (citation omitted).

16 **1. Condition-based Management**

17 As depicted in Figure 6 of the Final EA, the Project’s condition-based
 18 treatment areas cover about 21,149 acres of the Project area. AR12617 (Figure 6);
 19 AR12616 (21,149 acres). About one-third of those acres cover commercial
 20 overstory thinning on matrix lands, with the remainder covering non-commercial
 21 understory thinning and prescribed fire. AR12617 (Figure 6 showing location of
 22 overstory thinning); AR12618 (7,275 acres); AR12621 (explaining understory
 23 stand-improvement thinning “non-commercial”). The Final EA contains detailed
 24 maps identifying the location of the proposed understory and overstory vegetation
 25 treatments on a unit-by-unit basis and the prescribed fire treatments and associated
 26 firelines. AR12817-21 (Figures 13-17).

27 The Forest Service determined the areas for potential condition-based
 28

1 treatments based on vegetation and fuels data showing “species composition,
2 diameter class, canopy layers, tree and shrub canopy cover, and vegetation
3 clumpiness.” AR12526. Initial data was obtained “through aerial photo
4 interpretation, local knowledge, and limited field verification.” *Id.* That
5 information was then used to model “stand structures, forest types, and insect and
6 disease vulnerabilities” throughout the Project area. *Id.* Based on that modeling,
7 “[p]atches of similar vegetation composition and structure over 10 acres in size”
8 were identified as forested stands, with “field data sampling” being conducted on
9 a “subset of these stands representing the variety of forest conditions within the
10 analysis area.” *Id.*; *see also* AR12527 (noting “field surveys began in 2018,” with
11 “[s]ilvicultural and pre-cruise walk-thru exams” occurring across the Project area
12 in 2019). Using this data, the Forest Service established decision criteria for each
13 potential condition-based treatment that will be applied to conditions on the ground
14 to determine whether the treatment will be implemented. AR12616-17. This will
15 ensure “that the right activity occurs on the right location to move the landscape
16 towards the desired condition.” AR12616.

17 For example, the Forest Service used vegetation data to identify the 7,275-
18 acre overstory matrix thinning areas. But as the Final EA contemplates, “some of
19 these areas would not be treated because they do not meet the decision criteria.”
20 AR12616; *see also* AR12622-23 (decision criteria for matrix thin). So it is possible
21 that less than the 7,275 acres would be subject to overstory thinning because some
22 stands within the condition-based management area would not meet the decision
23 criteria. But in any event no more than the identified 7,275 acres will receive
24 overstory thinning. Nevertheless, in assessing the potential effects of the Project
25 on various resources, the Final EA considered the maximum potential effects of the
26 Project by assuming all 7,275 acres would be treated. AR12616-17; *see also*
27 AR12532 (“Although actual acres treated would vary across the landscape, the
28

1 effects of implementing every acre of proposed treatments will be analyzed to
2 clearly show the maximum effect of the proposed treatment.”).

3 This approach allowed the Final EA to take a hard look at the Project’s
4 potential effects on various resources. *See* AR12634-708. For example, the Final
5 EA assessed the Project’s potential effects on NSO habitat, finding that if all
6 vegetation and fuel reduction treatments were implemented, they would remove
7 “877 acres of low-quality” nesting, roosting, or foraging habitat from the Project
8 area, along with 5,141 acres of dispersal habitat. AR12663. Calculation and
9 disclosure of these types of maximum potential effects provides the reasonably
10 thorough discussion of the significant aspects of the probable environmental
11 consequences of the Project that NEPA requires. *See WildEarth Guardians v.*
12 *Conner*, 920 F.3d 1245, 1258 (10th Cir. 2019) (upholding EA analyzing
13 “maximum possible effect on lynx habitat” where specific timing and location of
14 vegetation treatments not known). Plaintiff’s arguments to the contrary are
15 unavailing.

16 Plaintiff first contends that “[n]o one can possibly know” the potential effects
17 of condition-based management in “roughly 87%” of the Project area “because the
18 point of condition-based management is to wait to specify what logging will occur
19 only *after* the loggers reach the area to be logged.” Pl.’s Br. 17 (emphasis in
20 original). This argument misconstrues the Project and condition-based
21 management. As noted above, commercial timber harvest will occur on at most
22 around one-third of the condition-based management area, not the “roughly 87%”
23 of the Project area that Plaintiff misleadingly suggests. And the Final EA details
24 the specific thinning prescriptions and harvest methods that will apply on the stands
25 in that area that meet the decision criteria. *See* AR12723-25 (overstory matrix
26 thinning prescriptions); AR12726-29 (thinning methods and timing).

27 Plaintiff ignores this detailed information in criticizing the Final EA’s
28

1 consideration of the maximum potential effects of condition-based management,
2 maintaining that such effects are unknowable because “there is no possible way the
3 Federal Defendants could determine what the ‘maximum’ amount of logging is that
4 would supposedly restore the forest to its ‘historical’ state.” Pl.’s Br. 18. In making
5 this argument, Plaintiff seems to think that the type or intensity of thinning in a
6 given stand will vary under condition-based management. This misunderstands the
7 Project. The thinning prescriptions apply to any stands that Forest Service
8 personnel determine meet the decision criteria for inclusion in the overstory
9 thinning. AR12721-25. For example, trees up to 21 inches in diameter in a dry
10 forest stand that meets the overstory decision criteria will be thinned from below
11 to leave 20 to 30 trees per acre. AR12724.

12 And far from not knowing which treatments would move the forest toward
13 the desired reference conditions, Forest Service specialists developed the
14 applicable prescriptions specifically to “modify stand structures to move departed
15 conditions such as the abundance of young forest multi-story into desired stand
16 structures.” AR12721; *see also* AR12533 (explaining beneficial effects of
17 treatments). The only issue that condition-based management addresses is whether
18 a stand will be included for treatment. If it is excluded because it does not meet
19 the decision criteria, there will be no treatment. If it is included because it meets
20 the decision criteria, it will be treated according to the prescriptions in the EA that
21 the Forest Service determined would move the forest toward desired conditions.
22 As such, by identifying the most acres that could be subject to treatment, the Final
23 EA did in fact estimate the maximum potential effects of the Project. Plaintiff’s
24 misunderstanding of the Project does not support a NEPA violation.

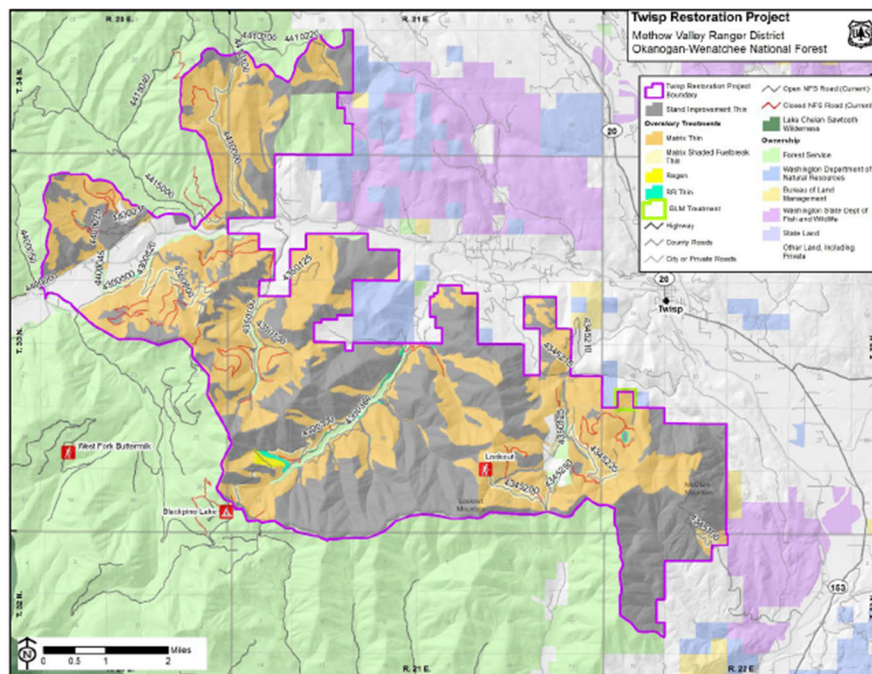
25 Finally, Plaintiff seems to suggest that condition-based management is
26 inherently irreconcilable with NEPA. Pl.’s Br. 19 (noting condition-based
27 management is “antithesis” of what NEPA requires). But the only case Plaintiff
28

1 cites to ostensibly support that proposition is clearly distinguishable. *Id.* at 18
2 (citing *Or. Nat. Desert Ass'n v. Jewell (ONDA)*, 840 F.3d 562, 570-71 (9th Cir.
3 2016)). That case found that an agency had not established adequate baseline
4 conditions because it relied on “inaccurate data” regarding the presence of sage
5 grouse outside of a project area to make assumptions about the potential presence
6 of sage grouse within the project area. *ONDA*, 840 F.3d at 570. By contrast, here,
7 the Forest Service relied on vegetation data within the Project area to identify
8 locations likely to have stands with certain characteristics that would benefit from
9 thinning or prescribed fire treatments. This data established a reasonable baseline
10 against which the Project’s potential effects could be viewed. *See Great Basin Res.*
11 *Watch v. Bureau of Land Mgmt.*, 844 F.3d 1095, 1101 (9th Cir. 2016) (“An agency
12 need not conduct measurements of actual baseline conditions in every situation—
13 it may estimate baseline conditions using data from a similar area, computer
14 modeling, or some other reasonable method.”).

15 Although not cited by Plaintiff, it is worth noting that the facts of this case
16 are materially different from those in *Southeast Alaska Conservation Council v.*
17 *U.S. Forest Service*, 443 F. Supp. 3d 995 (D. Alaska 2020), in which a district court
18 found an EIS for a project that applied ““condition-based analysis”” violated NEPA.
19 *Id.* at 1003. The condition-based approach in that case applied to 1.8 million acres,
20 potentially authorizing 46 different types of activities, including various
21 approaches to timber harvest such as “clear-cut methods.” *Id.* at 1000-02. The
22 project identified 125,529 acres for potential timber harvest, nearly two-thirds of
23 which would be in old-growth forest. *Id.* at 1001. But the acreage available for
24 timber harvest varied from alternative to alternative without identifying the
25 location of the actual harvest units. *Id.* at 1008. And the court noted the EIS did
26 not specify the “methods” of harvest that would apply and did “not include a
27 determination—or even an estimate—of when and where the harvest activities or
28

road construction authorized by each alternative will actually occur.” *Id.* at 1002, 1009. All these facts combined led the court to conclude that the EIS did not foster public participation and informed decision-making. *Id.* at 1010.

By contrast, the Project area is around *one percent* of the project area at issue in *Southeast Alaska Conservation Council*. And within that much smaller Project area, the Final EA identifies the specific methods of understory thinning, overstory treatments, and fuels reduction that will be employed and where those methods may be employed. For example, the below map identifies where within the Project area understory thinning can occur (gray) in relation to the overstory matrix thinning (orange), matrix shaded fuelbreak thinning (tan), regeneration harvest (yellow), and riparian reserve thinning (turquoise).



AR12817. The Final EA also breaks this map down into three other maps that provide the same information on specific units in the Project area. AR12818-20. These various areas correspond to the detailed prescriptions set forth in the Final EA. AR12722-23 (understory), AR12723-25 (matrix thin), AR12725 (matrix

1 shaded fuelbreak thin), AR12725-26 (regeneration), AR12726 (riparian reserve).²
2 And the Final EA explains the methods and timing for the understory and overstory
3 thinning. AR12726-29; AR12621-22 (Figure 7).

4 That some of these areas may not ultimately be thinned or otherwise treated
5 where on-the-ground conditions differ from those estimated by the Forest Service
6 in no way undermines the usefulness and adequacy of this information in promoting
7 public participation and informed decision-making. Anyone reviewing this
8 information will know exactly where proposed activities may occur, when they
9 may occur, which prescriptions apply, and which harvest methods may be
10 employed. NEPA requires nothing more.

11 **2. Potential Midnight Restoration Project**

12 Plaintiff next argues that the Final EA violated NEPA by not considering the
13 cumulative impacts of a potential project that had not yet been subject to scoping.
14 Pl.'s Br. 19. Plaintiff is mistaken.

15 In considering a project's cumulative impacts, an agency must consider other
16 "reasonably foreseeable" projects. *Env't Prot. Info. Ctr. (EPIC) v. U.S. Forest*
17 *Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006) (citation omitted). But NEPA does not
18 "require the government to do the impractical," *id.*, and an agency's determination
19 of the scope of its analysis of the effects of reasonably foreseeable actions is subject
20 to deference, *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071
21 (9th Cir. 2002).

22 After the Cedar Creek Fire burned through a portion of the originally
23 proposed project area, the Forest Service decided to remove the areas potentially
24 affected by the fire from consideration in the proposed action. AR12594. As noted
25 in the Final EA, these areas were "under assessment to determine the degree to
26

27 ² The same detail applies to the fuel reduction treatments. *See* AR12821 (map);
28 AR12729-32 (treatment specifics).

1 which baseline vegetation and terrestrial habitat conditions were affected [by] fire
2 behavior and suppression activities from the Cedar Creek fire, and to assess
3 whether previously identified or new needs for treatment exist.” *Id.* Although a
4 potential project called the Midnight Restoration Project covering these areas was
5 under internal Forest Service consideration, any such project was in its initial
6 planning stages and had not yet been subject to public scoping at the time the Final
7 EA for the Twisp Project was issued. AR12594-95 (noting any needs for areas
8 dropped due to fire “would be addressed by initiating new projects and analyses.”);
9 *see also* AR11381 (email to Plaintiff noting no decision on whether to move
10 forward with a project as of March 2022). This shows that the inchoate Midnight
11 Restoration Project was not reasonably foreseeable, and the Final EA had no duty
12 to speculate about any potential cumulative effects of the potential project.

13 Plaintiff’s argument to the contrary ignores *EPIC*, which held in a similar
14 situation that it was not arbitrary or capricious for the Forest Service to omit a
15 project in its initial planning stages from the cumulative effects analysis. 451 F.3d
16 at 1014-15. In that case, the Forest Service had initially proposed a large timber
17 harvest project that was later abandoned. *Id.* at 1014. The Forest Service then
18 approved a timber sale that had been part of that larger project. *Id.* While
19 conducting an EA for that project, the Forest Service had proposed another project
20 that had also been part of the abandoned larger project. *Id.* Despite the common
21 origin of the projects, the court held that it was not arbitrary or capricious for the
22 Forest Service to entirely omit the proposed project from the cumulative effects
23 analysis in the EA because at the time the EA was issued, the “project had just been
24 proposed” and its parameters were unknown. *Id.* at 1014-15.

25 The same analysis applies here. At the time the Twisp Project Final EA was
26 issued, the Midnight Restoration Project was in its initial planning stages, no
27 decision had been made as to whether such a project would move forward, and no
28

1 scoping had occurred. Thus, it was not arbitrary or capricious for the Final EA to
 2 omit the nascent Midnight Restoration Project from its cumulative effects analysis.³
 3 *See League of Wilderness Defs./Blue Mountains Biodiversity Proj. v.*
 4 *Connaughton*, 752 F.3d 755, 762 (9th Cir. 2014) (“Although projects need not be
 5 finalized before they are reasonably foreseeable, they must be more than merely
 6 contemplated.” (citations omitted)); *Theodore Roosevelt Conserv. P’ship v.*
 7 *Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (finding not arbitrary or capricious to
 8 omit projects from a cumulative effects analysis “for which nothing had been
 9 completed except notices of intent” (i.e., scoping)). The Final EA took a hard look
 10 at the Project’s potential cumulative effects, and Plaintiff’s arguments to the
 11 contrary are unfounded.

12 **C. The Forest Service Satisfied NEPA’s Public Participation** 13 **Requirements.**

14 In arguing that the Forest Service violated NEPA’s public participation
 15 requirement, Plaintiff restates its misguided argument that the condition-based
 16 management approved by the Project is somehow antithetical to NEPA. Pl.’s Br.
 17 20-22. For the reasons discussed in section II.B.1 above, this argument
 18 misunderstands the condition-based management approved by the Project and
 19 ignores the relevant analyses in the Final EA and supporting specialist reports. By
 20 estimating stand characteristics throughout the Project area, identifying which of
 21 those stands may be thinned or otherwise treated, detailing the prescriptions that
 22 would apply to the thinning or treatment in each area, and assessing the potential
 23 effects of those actions, the Forest Service provided the public with more than
 24 _____

25 ³ In contrast, the specialist reports supporting the Final EA did address the Twisp
 26 Aquatic Restoration Project because implementation of that project was expected to
 27 begin soon after April 2022, rendering the project’s potential effects reasonably
 28 foreseeable. AR12595.

1 enough information to actively participate during the development of the Project.

2 Plaintiff also argues that the Forest Service was required to reopen the public
3 comment period before releasing the Final EA after the Cedar Creek fire burned
4 through a portion of the originally proposed Project area. Pl.'s Br. 21. NEPA
5 contains no such requirement. Indeed, NEPA does not require that a Draft EA even
6 be issued to the public in all circumstances. *Bering Strait Citizens for Responsible*
7 *Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 952 (9th Cir. 2008) ("We
8 hold today that the circulation of a draft EA is not required in every case."). Instead,
9 when preparing an EA, an agency need only "provide the public with sufficient
10 environmental information, considered in the totality of circumstances, to permit
11 members of the public to weigh in with their views and thus inform the agency
12 decision-making process." *Id.* at 953.

13 The Forest Service more than met this standard. The Forest Service engaged
14 the public during the scoping period by identifying the proposed project (including
15 the use of condition-based management), hosting an open house, and requesting
16 comments. *See supra* § I.A.3.a. The Forest Service then released an extensive
17 Draft EA, detailing the proposed project and the specific prescriptions that would
18 apply to the proposed understory thinning, overstory treatments, and fuel reduction
19 work, and assessing the potential environmental effects of those actions. *See supra*
20 § I.A.3.b; AR07406-17; AR07513-27. The Forest Service received over 1,000
21 comments on the Draft EA. AR12606.

22 After the Cedar Creek Fire burned through a portion of the Project area, the
23 Forest Service presented information "the brevity and clarity" of which "was
24 impressive," at a public meeting before issuing the Final EA. *See supra* § I.A.3.c.
25 And after issuing the Final EA, the Forest Service received and considered
26 objections to the Final EA and draft DN/FONSI, including objections "based on
27 new information that arose after the opportunities for comment." *Id.*; AR12090.
28

1 Plaintiff participated in this objection process and has identified no issues it could
 2 not raise during that process. *See* AR12162-253. Only after consideration of these
 3 comments and objections did the Forest Service approve the Project. This
 4 substantial public participation satisfied NEPA. *See Cal. Trout v. FERC*, 572 F.3d
 5 1003, 1017 (9th Cir. 2009) (“[T]he level of participation required by NEPA’s
 6 implementing regulations is not substantial.”).⁴

7 **D. The FONSI was not Arbitrary or Capricious.**

8 Under NEPA, “an agency may prepare an EA to decide whether the
 9 environmental impact of a proposed action is significant enough to warrant
 10 preparation of an EIS.” *Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d
 11 1208, 1212 (9th Cir. 1998). “Whether an action ‘significantly’ affects the
 12 environment requires analyzing both ‘context’ and ‘intensity.’” *Wild Wilderness v.*
 13 *Allen*, 871 F.3d 719, 727 (9th Cir. 2017) (citing 40 C.F.R. § 1508.27 (2017)).
 14 “Context refers to the setting in which the proposed action takes place,” *Ocean*
 15 *Advoc. v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005) (citing 40
 16 C.F.R. § 1508.27(a) (2005)). “Intensity means ‘the severity of the impact.’” *Id.*
 17 (quoting 40 C.F.R. § 1508.27(b) (2005)). “[T]he regulations identify ten factors that
 18 agencies should consider in evaluating intensity.” *In Def. of Animals, Dreamcatcher*
 19 *Wild Horse & Burro Sanctuary v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1068 (9th
 20 Cir. 2014) (citing 40 C.F.R. § 1508.27(b)(1)-(10) (2014)). An agency can
 21 “reasonably rel[y] on its own expert reports and technical expertise in concluding
 22 that the impact of the project would be insignificant.” *Bark v. Northrop*, 607 F.
 23 App’x at 655. A FONSI “may be overturned only if it is ‘arbitrary, capricious, an
 24 abuse of discretion, or otherwise not in accordance with law.’” *Anderson v. Evans*,
 25 371 F.3d 475, 486 (9th Cir. 2004).

26
 27 ⁴ Plaintiff’s cursory references to its claims about alternatives and cumulative effects
 28 are unavailing for the reasons noted above. Pl.’s Br. 21-22.

1 The Forest Service considered the context and intensity of the Project as
2 assessed in the Final EA and additional “documentation in the project record,” and
3 concluded that preparation of an EIS was not needed because the Project would not
4 “have a significant effect on the quality of the human environment.” AR12843.
5 The FONSI and supporting documents fully explain the basis for this conclusion,
6 AR12843-56, providing the “convincing statement of reasons” as to why a
7 project’s impacts are insignificant that NEPA requires, *Native Ecosys. Council*, 428
8 F.3d at 1239 (citation omitted).

9 In challenging this conclusion, Plaintiff fails to even mention the Project’s
10 context and intensity. Pl.’s Br. 22-23. This alone is fatal to this claim. But, even
11 if it were not, Plaintiff’s arguments are unfounded. Indeed, Plaintiff suggests that
12 any project intended to protect life and property from wildfire must, by definition,
13 require preparation of an EIS. *Id.* at 23. This is clearly wrong, as courts routinely
14 uphold FONSI’s for forest restoration projects like the Project that are intended to
15 improve forest resiliency and reduce the risk of catastrophic wildfire. *See, e.g.,*
16 *Native Ecosys. Council*, 428 F.3d at 1236 (upholding FONSI for thinning and
17 prescribed burning project “designed to reduce the potential for a large-scale, high
18 intensity, stand-replacing fire in the [project] vicinity.”); *All. for the Wild Rockies*
19 *v. Pena*, 865 F.3d 1211, 1215, 1217-20 (9th Cir. 2017) (upholding FONSI for
20 “forest restoration project” with “commercial timber harvest treatments, road
21 maintenance, stream restoration, and culvert replacements.”); *Blue Mountains*
22 *Biodiversity Proj. v. Trulock*, 2023 WL 3645966, at *1, 18-21 (D. Or. April 27,
23 2023) (upholding FONSI for 40,000-acre project with 31,000 acres of prescribed
24 burning and 12,220 acres of forest thinning, including 8,190 acres of commercial
25 logging); *Conserv. Cong. v. U.S. Forest Serv.*, 2018 WL 2427640, at *4, (E.D. Cal.
26 May 30, 2018) (upholding FONSI for a project authorizing “vegetation and fuels
27 treatments” to improve forest resiliency and promote old growth habitat).
28

1 Plaintiff also argues that an EIS was required because the Project area “is
2 home to a multitude of [ESA] listed species, like the Columbia River spring
3 chinook.” Pl.’s Br. 22. But this argument ignores that it is not the presence of
4 ESA-listed species that determines a project’s significance; it is the *degree of any*
5 *effect* of a project on the species. *See EPIC*, 451 F.3d at 1012; *see also Native*
6 *Ecosys. Council*, 428 F.3d at 1240 (“We decline to interpret NEPA as requiring the
7 preparation of an EIS any time that a federal agency discloses adverse impacts on
8 wildlife species or their habitat or acknowledges information favorable to a party
9 that would prefer a different outcome.”). And it is not enough to show potential
10 effects to individuals of a species. The relevant inquiry is what effect a project will
11 have on the species as a whole. *See EPIC*, 451 F.3d at 1010.

12 Plaintiff does not identify any effects, much less significant effects, that the
13 Project will have on any ESA-listed species, and the record shows there would be
14 no significant effects. *See* AR12851-55. For example, the aquatics report explains
15 that two components of the Project—decommissioning a campground and a
16 separate campsite—have the “potential for short-term, direct and indirect adverse
17 effects to ESA-listed species.” AR11953. The remaining components “would
18 result in a few small, insignificant negative effects to ESA-listed fish and some
19 long-term, insignificant beneficial effects.” *Id.* In light of these insignificant
20 effects, NMFS concurred with the Forest Service’s determination that the proposed
21 action may affect but would not likely adversely affect two ESA-listed aquatic
22 species (including the spring-run Chinook salmon), explaining that the
23 “combination of no-cut buffers in riparian reserves, harvest and haul management
24 that reduce dust and sediment delivery, proximity of harvest and haul activities
25 from occupied habitat, and implementation of design criteria and minimizing
26 measures reduces the effect of the [Project] to a point of insignificance.” AR12134.

27 Similarly, the wildlife report explained that the Project “would not disturb
28

1 any known nesting pairs of northern spotted owls” because no nesting pairs are
2 known to exist “within or adjacent to the project area” despite years of surveys.
3 AR11667. Nor is there any “high-quality nesting habitat” in the Project area, and
4 a “total of 877 acres of low-quality [nesting/roosting/foraging (NRF) habitat] will
5 be removed from the project area (4% in designated critical habitat),” and around
6 5,000 acres of dispersal habitat would be removed. *Id.* In concurring with the
7 Forest Service’s determination that the Project may affect but would not likely
8 adversely affect the NSO, FWS explained these effects would be “insignificant”
9 considering “the baseline conditions for northern spotted owl habitat and
10 occurrence in the action area and surrounding areas, in combination with
11 implementation of design criteria and conservation measures.” AR12441. All this
12 supports the Forest Service’s finding that the Project would not significantly affect
13 the environment. *See, e.g., Conserv. Cong.*, 2018 WL 2427640, at *15 (upholding
14 FONSI even where project likely to adversely affect NSO under ESA).

15 Plaintiff also continues to misconstrue the Project’s condition-based
16 management as “logging with virtually no oversight,” to support its argument that
17 an EIS was required. Pl.’s Br. 22. As explained above, however, Plaintiff
18 misunderstands the condition-based management approved by the Project. Far
19 from raising substantial questions about the Project’s potential effects, the Final
20 EA and supporting silviculture specialist report identify exactly where the
21 understory thinning, overstory treatments, and fuel-reduction activities are
22 authorized, specify the prescriptions that apply to each action, and explain how
23 those actions will move the treated areas from their current unnatural conditions to
24 being within the desired historic and future ranges of variability. AR12616-24;
25 AR12654-55; AR12718-32; AR12816-21. The Forest Service supported these
26 conclusions with extensive modeling, analysis, and literature. *See* AR12532-37;
27 AR12548-49; AR12845-46.

1 Unlike in *Bark v. U.S. Forest Service*, 958 F.3d 865, 870 (9th Cir. 2020),
2 where the court found “[s]ubstantial expert opinion presented by [the plaintiff]
3 during the administrative process” disputing the Forest Service’s conclusion that
4 the thinning approved by the project in that case “is helpful for fire suppression and
5 safety,” Plaintiff points to no such “substantial expert opinion” that would suggest
6 the effects of the Project are highly controversial or uncertain. As explained by the
7 FONSI, they are not. AR12845-46. In fact, “management activities associated
8 with the [Project] are typical of those successfully implemented on National Forest
9 System lands, including the Okanogan-Wenatchee National Forest.” AR12846.
10 As such, the FONSI was not arbitrary or capricious, and Plaintiff’s claim fails.

11 Finally, Plaintiff asks the Court to “remand the [Project] back to the Federal
12 Defendants to prepare a complete EIS.” Pl.’s Br. 23. For the reasons discussed
13 above, the FONSI was not arbitrary or capricious and remand is unwarranted. But
14 even if remand were warranted, the proper remedy would not be to remand for
15 preparation of an EIS because where “there is uncertainty over whether the
16 proposed project may have a significant impact, including uncertainty caused by
17 an incomplete administrative record or an inadequate [environmental assessment],”
18 a court “should ordinarily remand for the agency to either prepare a revised
19 [assessment] or reconsider whether an EIS is required.” *Ctr. for Biological*
20 *Diversity v. Nat’l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1179 (9th Cir. 2008).
21 Ordering the Forest Service to prepare an EIS fails to recognize that the agency still
22 has “a wide variety of actions it may take on remand.” *San Luis Obispo Mothers*
23 *for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006).

24 CONCLUSION

25 For the above-stated reasons, Plaintiff’s motion for summary judgment
26 should be denied and Defendants’ cross-motion granted.
27
28

1 Respectfully submitted this 11th day of August, 2023.

2
3 TODD KIM
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7

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system.

/s/ Shaun M. Pettigrew
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U.S. Department of Justice